In the Supreme Court of the United States

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OCTOBER TERM, 1973

No. 73-640

DWIGHT GEDULDIG,
Appellant,

vs.

CAROLYN AIELLO,
individually and on behalf of
all others similarly situated,
Appellees.

DWIGHT GEDULDIG,
Appellant,

vs.

AUGUSTINA D. ARMENDARIZ,
ELIZABETH B. JOHNSON,
JACQUELINE JARAMILLO,
individually and on behalf of all
other women similarly situated,
Appellees.

Consolidated Cases on Appeal from the United States District Court for the Northern District of California

Jurisdictional Statement

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Jurisdictional Statement

Appellant Dwight Geduldig, Director of the California Department of Human Resources Development,[1] appeals

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1. Dwight Geduldig has succeeded Sigurd Hansen, defendant below, as Director of the California Department of Human Resources Development.

from the judgment of a three-judge court convened in the Northern District of California declaring unconstitutional and enjoining enforcement of the third sentence of California Unemployment Insurance Code (U.I.C.), section 2626, which excludes pregnancy from coverage under the state disability insurance program, and from an order of the three-judge court denying Appellant's motion to reconsider and set aside the Court's judgment, entered on August 7, 1973. Appellant submits this statement to establish the jurisdiction of the Court and the substantiality of the federal question presented.

OPINIONS BELOW

The opinion of the three-judge court declaring unconstitutional the third sentence of section 2626 of the California U.I.C. is not yet reported. No opinion was rendered by the majority of the Court in denying Appellant's motion to reconsider and set aside the judgment of the Court. Judge Williams wrote a dissenting memorandum which is not yet reported. Copies of the majority and dissenting opinions and the judgment of the Court declaring unconstitutional the third sentence of section 2626 of the California U.I.C. are attached hereto as Appendix "A" and "B" respectively. Copies of the Court's order denying Appellant's motion to reconsider and set aside the Court's judgment and Judge Williams' dissenting memorandum are attached hereto as Appendix "C" and "D" respectively.

JURISDICTION

These consolidated actions were brought by Appellees on behalf of themselves and all other pregnant women similarly situated, for injunctive and declaratory relief pursuant to Title 42 United States Code section 1983, and Title 28 United States Code sections 2201 and 2202. Jurisdiction

of the District Court was invoked pursuant to Title 28 United States Code sections 1343(3) and (4). Appellees sought a declaration that the third sentence of California U.I.C. section 2626, which excludes pregnancy from coverage under the state disability insurance program, is an unconstitutional denial to women of equal protection of the laws, contrary to the Fourteenth Amendment and also sought an injunction against further enforcement of the pregnancy exclusion.[2] A petition in intervention was filed by several labor organizations on behalf of their female members seeking the same substantive relief as Appellees but also asking that relief be granted, and disability benefits for pregnancy paid, retroactively to December 14, 1969.[3] Order granting the petitioners intervenor status was entered January 30, 1973.

The court heard the matter on cross motions for summary judgment and on May 31, 1973, two judges of the specially-convened three-judge District Court held the pregnancy exclusion to be an unconstitutional denial of equal protection to women and enjoined appellant from further enforcing the third sentence of section 2626. The decision is silent on the question of retroactivity. Judgment was entered June 15, 1973.

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2. Since appellees sought an injunction against enforcement of a state statute, a three-judge court was convened under Title 28 United States Code sections 2281 and 2284.

3. The intervenors are United Automobile, Agricultural, Implement and Aerospace Workers of America (UAW); United Brotherhood of Carpenters and Joiners of America, AFL-CIO; California State Council of Carpenters; United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO; International Ladies Garment Workers Union, AFL-CIO; Printing Specialties and Paper Products Union District Council No. 2; Social Services Employees Union, Local 535; Alameda County Central Labor Council, AFL-CIO; and Contra Costa County Labor Council, AFL-CIO, on behalf of all of the affiliated Unions of each of the above labor organizations representing the women members of said unions and on behalf of all other women similarly situated. No explanation was given by intervenors for selection of the date of December 14, 1969 in connection with retroactivity.

Appellant filed a timely motion for reconsideration, attached hereto as Appendix "E." This motion was based upon a change in state law, discussed below in more detail, which in effect narrowed the statute to exclude only "maternity benefits" for normal pregnancy and eliminated the exclusion for complications. The District Court, again in a two-to-one decision, denied rehearing on August 7, 1973. Appellant's Notice of Appeal to this Court was filed in the United States District Court for the Northern District of California on August 13, 1973. A copy of the Notice of Appeal is attached hereto as Appendix "F."

The jurisdiction of the Supreme Court of the United States to hear this direct appeal is conferred by Title 28 United States Code sections 1253 and 2101(b). *Jefferson v. Hackney,* 406 U.S. 535 (1972); *Dandridge v. Williams,* 397 U.S. 471 (1970).

THE STATUTE INVOLVED

The specific statute challenged is California Unemployment Insurance Code, section 2626 (Stats. 1953, c. 308 p. 1531), which reads as follows:

> "'Disability' or 'disabled' includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work. In no case shall the term 'disability' or 'disabled' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter."

Other pertinent statutory provisions of the disability insurance program are set forth in Appendix "G" hereto.

QUESTION PRESENTED

Does the State of California violate the equal protection clause of the Fourteenth Amendment of the United States Constitution by denying monetary benefits to women for normal pregnancy pursuant to a state disability insurance program designed to provide benefits for illness or injury?

STATEMENT OF THE CASE

This is an appeal from a judgment of a three-judge district court for the Northern District of California (one judge dissenting) granting summary judgment against the State of California in consolidated actions by Appellees which sought a declaration that section 2626 of the California U.I.C., which does not provide benefits for pregnancy, constitutes a denial of equal protection of the laws contrary to the Fourteenth Amendment, and sought an injunction against further enforcement of that provision.[4] Appellant contended that the California code section under review represented an appropriate legislative determination by the state not to include pregnancy within a disability insurance program designed to provide benefits for illness or injury, because the condition of pregnancy is clearly distinguishable from illness or injury, and because including maternity benefits coverage within the disability insurance program would disproportionately channel the finite funds available to a small percentage of the work force and would ultimately

4. The action on behalf of Carolyn Aiello and others was filed in the U.S. District Court for the Northern District of California on July 31, 1972. The action on behalf of Augustina Armendariz and others was commenced in the Supreme Court of the State of California on August 16, 1972, was removed to U.S. District Court on August 24, 1972, and was ordered consolidated with the Aiello case, to proceed under the Aiello title, on December 5, 1972. Appellees Aiello and Johnson suffered ectopic pregnancies; Appellee Armendariz suffered a miscarriage. All three applied for disability insurance benefits, which were denied. Appellee Jaramillo's claim is unclear. She was eight months pregnant at the commencement of this action and had experienced no complications of pregnancy. She sought benefits for the period during which she would be incapacitated by the delivery of her child. However, she has never filed a claim for disability benefits, so far as is known to Appellant.

destroy the solvency of the program as a whole. The District Court held, however, that the failure to provide benefits for pregnancy was "not based upon a classification having a rational and substantial relationship to a legitimate state purpose" and was therefore unconstitutional.[5] The District Court also noted that "[t]he search for the purposes that actuated the legislature is a difficult one." As will be demonstrated, the exclusion of pregnancy has a very substantial relationship to a legitimate state purpose. Moreover, the history of the legislation and of the exclusion of pregnancy from it is very easy to find. The dissent of Judge Williams discusses the entire historical background of the disability insurance program at length.[6] The majority simply ignored it.

While this case was pending before the District Court, and unknown to the Court or to the litigants, the California Court of Appeal for the Second Appellate District was considering a case entitled *Rentzer v. California Unemployment Insurance Appeals Board* which also involved construction of section 2626 of the California Unemployment Insurance Code. The *Rentzer* case was commenced by a petition for writ of mandate in Los Angeles County Superior Court on January 19, 1972. Gail Rentzer had suffered an ectopic pregnancy which necessitated surgery to save her life. As a consequence, she was unable to work for six weeks. When the California Unemployment Insurance Appeals Board denied her disability benefits for the first 28 days of her six-week disability, she petitioned the Superior Court for a writ mandating the California Unemployment Appeals Board to provide her with full disability benefits. Ms. Rentzer appealed the denial of her petition to

5. Appendix A-17.
6. Appendix A-22-26.

the Court of Appeal. On May 29, 1973, the Court of Appeal rendered its opinion reversing the judgment of the Superior Court. In so doing, the Court, citing with approval an earlier California Court of Appeal decision, *Clark v. California Emp. Stab. Com.*, 166 Cal.App.2d 326 (1958), construed the third sentence of section 2626 of the California U.I.C. to exclude only "maternity benefits," that is, benefits for normal gestation and delivery. The California Court of Appeal decision in *Rentzer v. California Unemployment Insurance Appeals Board* is reported at 32 Cal. App.3d 604 (1973). A copy of that decision is attached as Appendix "H".

Following the *Rentzer* decision, the Department of Human Resources Development, on June 18, 1973, issued administrative guidelines attached as Appendix "I", excluding from coverage under section 2626 of the California U.I.C., only "maternity benefits"—*viz.*, hospitalization and disability benefits for normal delivery and recuperation.[7]

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7. On October 1, 1973, Assembly Bill 809 of the 1973 session was signed and is effective January 1, 1974. It amends the challenged section to read as follows:

"'Disability' or 'disabled' includes both mental or physical illness, mental or physical injury, and, to the extent specified in Section 2626.2, pregnancy. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work . . . .

[Section 2626.2]

"Benefits relating to pregnancy shall be paid under this part only in accordance with the following:

"(a) Disability benefits shall be paid upon a doctor's certification that the claimant is disabled because of an abnormal and involuntary complication of pregnancy, including but not limited to: puerperal infection, eclampsia, caesarean section delivery, ectopic pregnancy, and toxemia.

"(b) Disability benefits shall be paid upon a doctor's certification that a condition possibly arising out of pregnancy would disable the claimant without regard to the pregnancy, including but not limited to: anemia, diabetes, embolism, heart disease, hypertension, phlebitis, phlebothrombosis, pyelonephritis thrombophlebitis, vaginitis, varicose veins, and venous thrombosis." (Stats 1973, C. 1026)

Based upon the substantial change in state law brought about by *Rentzer* and the ensuing revision of the state disability program, Appellees Aiello, Johnson, and Armendariz would be entitled to benefits for their disabilities arising from complications of pregnancy. The only party still to be denied benefits would be Appellee Jaramillo who had a normal pregnancy and delivery. In light of this significant alteration of the issue before the court, Appellant's timely motion for reconsideration should have been granted. From the Judgment and subsequent Order denying reconsideration, Appellant brought this appeal.

THE QUESTION IS SUBSTANTIAL

The decision of the court below, in the name of equal protection of the laws, decreed that the physiological condition of normal pregnancy must be equated with conditions of illness and injury under the California U.I.C. By declaring that normal pregnancy shall be treated as an illness or injury[8] the district court not only ignored medical, actuarial and fiscal evidence of the dissimilarity of these conditions but also rejected the State's attempt to differentiate between medically discreet conditions in an area of public welfare legislation. The effect of this decision will be to frustrate the purposes of the legislation and the fiscal integrity of the State disability insurance program. In reaching this result, the lower court failed to apply the principles contained in this Court's most recent opinions defining the concepts of equal protection of the laws. *See,*

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8. In the light of the district court's denial of Appellants' timely motion for reconsideration based upon the California court's decision in *Rentzer, supra,* which construed section 2626, U.I.C. to exclude benefits only for normal pregnancy, the judgment below must be read to equate normal pregnancy with disabilities arising from illness and injury.

e.g., United States v. Kras, 409 U.S. 434, (1973); *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Reed v. Reed*, 404 U.S. 71 (1971); *Dandridge v. Williams*, 397 U.S. 471 (1970).

As mentioned above, the history of the disability insurance program is not hard to find. When the disability insurance program was first proposed by Governor Earl Warren in 1946, an integral part of the proposal was the use of the 1% of wages then being paid by employees into the unemployment insurance plan but not needed for that purpose to fund the disability insurance plan. The Governor's message to the State Legislature revealed his concern for maintaining the solvency of the fund while providing low-cost coverage:

> "[W]e have had eight years of experience and this experience demonstrates that disability compensation can be made available to workers without affecting the solvency of the fund and without the necessity for an additional contribution.
>
> • • •
>
> "It is not possible for employees to obtain from private insurance companies protection against loss of wages or salary during sickness as adequately or cheaply as the protection could be obtained by diverting their 1% contribution for the support of a Disability Benefits Program.
>
> • • •
>
> "Based on Rhode Island's actual experience, and with allowances for differences between the Rhode Island Law and the program now under consideration for California, the cost in California would approximate $35,000,000 a year.
>
> "This cost could be met entirely out of the 1 per cent employee contribution."[9]

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9. *California Senate Journal*, June 23, 1946, pp. 228-229.

The Rhode Island experience to which the Governor refers is instructive. The Rhode Island plan did not initially exclude pregnancy. Between 1944, when the Rhode Island plan began, and mid-1946, the program incurred a deficit of $1.5 million. In 1946, Rhode Island placed limits on pregnancy benefits.[10]

Since the entire California plan has been based on the low cost coverage available by exclusion of normal pregnancy, the decision of the lower court will have a very significant impact on the program. It will also affect the disability insurance plans of other states which differentiate between pregnancy and illness or injury.[11] Further, resolution of the medical and insurance treatment of pregnancy will have massive impact on public and private employer disability plans. Several cases are now proceeding in the lower federal courts involving such plans. *E.g., Newmon v. Delta Air Lines, Inc.*, ... F.2d ....., 5 EPD ¶ 8500 (5th Cir. 1973); *Gilbert v. General Electric Co.*, No. 142-72-R (E.D. Va. Filed March 15, 1973); *Communication Workers v. Illinois Bell Tel. Co.*, No. 73-C-959 (N.D. Ill. Filed April 13, 1973); *Communication Workers v. Southern Bell Tel. & Tel.*, No. 18328 (N.D. Ga. Filed May 17, 1973); *Grogg v. General Motors Corp.*, 73 Civ. 63 (S.D. N.Y.).[12]

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10. See "Disability Compensation For the Disabled Sick" by Nathan Sinai, Published by School of Public Health, University of Michigan (1949), pp. 29-31 for a discussion of this and other factors which resulted in differences in California's plan.

11. The disability insurance programs of New Jersey, New York, and Rhode Island treat pregnancy differently from other disabilities.

12. *See* the Memorandum, Amicus Curiae, of the United States recently filed in *Cleveland Bd. of Educ. v. La Fleur*, No. 72-777; *Cohen v. Chesterfield Cty. Sch. Bd.*, No. 72-1129, which addresses the separate issue of whether the Fourteenth Amendment prohibits discharge and mandatory leave for pregnant school teachers.

Appellant suggests that even if this Court were to determine that the public employers in *Cohen* and *LaFleur* cannot demonstrate a compelling or even rational basis for terminating pregnant em-

The California U.I.C. establishes a comprehensive legislative program designed to protect against wage loss caused by involuntary unemployment arising out of illness or injury. While the unemployment insurance program is funded by employer contributions, the disability insurance program is entirely supported by *employee* contributions which have a fixed statutory limit of 1% of earnings up to a maximum contribution of $85.00 per year.[13] Basic benefits under the disability plan are based on earnings, ranging from $25 to $105 per week, beginning the eighth day of disability. Basic benefits may continue for a maximum of 26 weeks. If an individual is hospitalized, basic benefits begin the first day and the person receives an additional benefit of $12 per day for a maximum of 20 days.

The annual cost of the disability plan is currently approximately $362.1 million, exclusive of pregnancy. This level of benefit payments results in an almost total utilization of the 1% contribution from employees' salaries. If pregnancy claims were added the annual payout from the fund would rise to $493.1 million, which is more that $100 million above the annual income of the fund.

The question is not only one of dollars, however, but of the proper characterization of normal pregnancy.

1. Normal Pregnancy Is Substantially Different from Illness or Injury

The exclusion of normal pregnancy from California's disability insurance program bears a rational and substantial relationship to the purposes of the legislation creating the disability fund—to compensate for physical and

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ployees or excluding them from employment for substantial periods of time, it is an entirely different proposition to argue that employees who can select their own period of leave must also be paid for that period of time when they have chosen to be absent for a *normal* pregnancy and delivery.

13. California U.I.C. section 984.

mental disabilities arising from illness or injury within the limited resources available from worker contributions. Reduced to its essence, Appellant's position is that there is no denial of equal protection of the laws in failing to provide wage continuation benefits for normal pregnancy when the disability program is addressed to conditions of illness and injury, particularly when the program as actually administered provides more benefits to women workers than to men, even without the addition of normal pregnancy.

As this Court reiterated in *Reed v. Reed, supra,* 404 U.S. at 75-76, the Equal Protection Clause "does not deny to States the power to treat different classes of persons in different ways." What it does prohibit is legislative classifications which are factually specious:

> A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a *fair and substantial relationship to the object of the legislation,* so that all *persons similarly circumstanced shall be treated alike.*"
> 404 U.S. at 76 (emphasis added).

Appellant suggests that the California statute under review fully meets this test. It differentiates between persons who are not "similarly circumstanced," and this differentiation bears a "fair and substantial relationship to the object of the legislation."

Even the most outspoken advocates of political and economic rights of women, who have supported the proposed Equal Rights Amendment to the United States Constitution, have recognized that equality does not mean sameness. For example, a memorandum of the Citizens' Advisory Council on the Status of Women, entitled *The Proposed Equal Rights Amendment to the United States Constitution* (1970) contains the following discussion:

"4. *Laws Which Could Not Possibly Apply to Both Sexes Because of the Difference in Reproductive Capacity.*

Laws which, as a practical matter, can apply to only one sex no matter how they are phrased, *such as laws providing maternity benefits* and laws prohibiting rape, would not be affected by the amendment. The extension of these laws to both sexes would be purely academic, since such laws would not apply differently if they were phrased in terms of both sexes. In these situations, the terminology of sex identification is of no consequence."

p. 13 (emphasis added).

The legislative history of the proposed Equal Rights Amendment is consistent:

"The legal principle underlying the Equal Rights Amendment (H.J. Res. 208) is that the law must deal with the individual attributes of the particular person and not with stereotypes of over-classification based on sex. However, the original resolution does not require that women must be treated in all respects the same as men. *Equality does not mean sameness.* As a result, the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex. For example a law providing for payment of the *medical costs of child bearing* could only apply to women. In contrast, if a particular characteristic is found among members of both sexes, then under the proposed amendment it is not the sex factor but the individual factor which should be determinative."

S. Rep. No. 92-689, p. 12 (emphasis added).

These comments on the meaning of sex differences and laws which recognize those differences are amply supported by actuarial, medical, and sociological authority on the

nature and consequences of pregnancy. As one eminent specialist has testified:

> Q. Is pregnancy a sickness or injury?
>
> A. No.
>
> Q. Could you give a medical definition of what pregnancy is in physical relationship?
>
> A. It is a normal biologic function. It should not be regarded as illness anymore than menstrual periods are regarded as an illness. An illness is when [a] bodily function is deranged, there is [a] malfunction of symptoms and pregnancy is, of course a normal biologic phenomena.[14]

The opinion that normal pregnancy is not a physical disability comparable to illness or injury is a widely-held view. For example, in "The Sick Role—Illness and Pregnancy," 6 Social Science and Medicine 561 (1972), at pages 568-571, the author, John B. McKinlay, Associate Professor of Sociology at Boston University, explains that pregnancy does not mesh with the concept of the "sick role," for these reasons:

> 1. It is considered statistically normal, in that most of the possible conceivers do conceive at some time. Cancer, coronary thrombosis and pneumonia are not, in this sense, normal "facts of life" or "natural vicissitudes."
>
> 2. Pregnancy is a normal biological function necessary for survival of the species. Sickness jeopardizes survival.
>
> 3. Pregnancy is normal because usually desirable. One often congratulates a woman who is pregnant, while those with sicknesses are not congratulated but are treated as abnormal and stigma often attaches.
>
> 4. A pregnant woman need not be motivated to "get

14. Testimony of Dr. Leo J. Dunn, Professor and Chairman of Obstetrics and Gynecology, Medical College of Virginia, quoted in respondent's brief to Supreme Court, pp. 12-13, in *Cohen v. Chesterfield, supra.*

well." The factor of motivation to recover is often crucial in restoration of health in real sickness cases.[15]

The factual difference between normal pregnancy and disabilities arising from illness or injury demonstrates that women experiencing a normal pregnancy are not "similarly circumstanced" when compared to men *and women* who are disabled for other physical or mental reasons.

2. To Include Benefits for Normal Pregnancy Would Frustrate the Legislative Purpose of the Disability Program and Contravene the Valid State Objective of Protecting the Fiscal Integrity of the Disability Fund

Nothwithstanding the district court's sweeping conclusion that fiscal considerations will not support legislative differentiations between normal pregnancy and illness or injury,[16] this Court has recognized the legitimacy of such State concerns "in 'the area of economics and social welfare.'" *Jefferson v. Hackney, supra,* 406 U.S. at 546; *Dandridge v. Williams, supra,* 397 U.S. at 487. Applying the *Reed* test of a "fair and substantial relation to the object of the legislation," it can be seen that the district court incorrectly rejected all of Appellant's arguments concerning cost, because the legislative history of this section makes it clear that cost to the *employees* who finance the program was the primary reason for the exclusion.

Moreover, actuarial data abundantly supports the validity of that legislative reasoning. As Judge Williams noted in his dissenting opinion, "Women contribute only 28% of withholdings but draw 38% of the benefit payments.

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15. In addition, there are numerous cases now pending in lower federal courts involving extensive medical evidence to the effect that pregnancy is not comparable to illness or injury. See p. 10, *supra.*

16. Appendix A-14.

Put another way, men receive $.89 per dollar contributed while women receive $1.37 per dollar contributed."[17]

These figures quoted by Judge Williams were based upon data furnished by Appellant from his agency's 1971 experience administering the disability insurance fund. The 1972 experience shows that men currently receive $.80 per dollar contributed while women receive $1.27 per dollar contributed. Appellant estimates, based on claims received to date, that adding pregnancy complications would result in women receiving $1.31 per dollar contributed. If normal pregnancy is included as well, the disparity becomes truly dramatic: women would receive $2.33 per dollar contributed compared to $.80 for men. Appellant submitted other actuarial data based on his agency's experience which showed that *in every age group* the ratio of cost to contributions for female workers is significantly greater than for men. This disparity is not unique to Appellant's program but is a well-known and well documented actuarial difference between the health and disability experiences of men and women. Appellant submitted data from the "Report of Mortality and Morbidity" published annually by the Society of Actuaries, which showed that both the annual claim rate and the annual claim cost are significantly greater for females than for males. These facts substantiate a legislative decision to structure the disability program in a fashion which would prevent a greater distortion in the share of benefits available to men and women.

Appellant also offered a statement issued July 13, 1973, by Herbert Denenberg, Insurance Commissioner of Pennsylvania before the Joint Economic Committee of the Congress at Hearings on The Economic Problems of Women in which Commissioner Denenberg said:

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17. Appendix A-19.

"Disability coverage poses a more difficult problem as the loss experience of women, even with pregnancy costs excluded, may run two and a half times higher than costs for men."[18]

The District Court did not consider any of this material relevant. The Court's explanation was that pregnancy disabilities cannot be excluded on the basis of cost, despite this Court's recognition of fiscal considerations when a state is attempting to administer a finite pool of public welfare resources.[19] *See Jefferson v. Hackney, supra,* 406 U.S. at 549.[20]

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18. Reasoning based upon the possible socially desirable objective of providing state assistance to pregnant employees, or the citizenry as a whole, cannot overcome factual evidence that the condition of normal pregnancy is not comparable to other conditions for which benefits are provided. See *Reed v. Reed, supra,* 404 U.S. at 75 (recognizing the immutable fact of differing longevity between the sexes). *See also,* Appellant's brief as Amicus Curiae in *Cohen* and *LaFleur, supra* at pp. 8-12.

19. The court cited *Shapiro v. Thompson,* 394 U.S. 618, 633 (1969), but made no effort to reconcile its reliance on *Shapiro* with footnote 10 from the same case, which says: "We are not dealing here with state insurance programs which may legitimately tie the amounts of benefits to the individual's contributions." 394 U.S. at 633.

20. Nor the mere fact that certain groups may be "disadvantaged" by the allocation enough to invalidate the legislative judgment. As this Court noted in *Jefferson v. Hackney, supra,* 406 U.S. at 548-49:

> The acceptance of appellants' [here, Appellees'] constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be. Few legislative efforts to deal with the difficult problems posed by current welfare programs could survive such scrutiny, and we do not find it required by the Fourteenth Amendment. [Citing *James v. Valtierra,* 402 U.S. 137 (1971)]

CONCLUSION

It is submitted that the District Court misapprehended the elements of equal protection required by the Fourteenth Amendment. The different treatment now accorded normal pregnancy under the California disability insurance plan is fully justified, by the well-documented acturial cost difference between men and women, by the fact that the physiological nature of normal pregnancy merits its exclusion under such a plan, and by the fact that the different treatment of normal pregnancy sustains the solvency of a fund created by employee contributions for disabilities arising from illness or injury. Appellant believes that the District Court erred; that the questions presented by this appeal are substantial and that they are of a nationwide importance.

FOR THE FOREGOING REASONS, PROBABLE JURISDICTION SHOULD BE NOTED.

Dated October 11, 1973.

Respectfully submitted,

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Appendix A

United States District Court
for the Northern District of California

rolyn Aiello, individually and on behalf of all others similarly situated, *Plaintiff,* vs. gurd Hansen, as Director of the State Department of Human Resources Development, *Defendant.*	No. C-72-1402 SW
gustina D. Armendariz, Elizabeth B. Johnson, Jacqueline Jaramillo, et al., individually and on behalf of all other women similarly situated, *Petitioners,* vs. gurd Hansen, as Director of the State Department of Human Resources Development, *Respondent.*	No. C-72-1547 SW

ore: DUNIWAY, Circuit Judge, WILLIAMS and ZIRPOLI, District Judges.

OPINION

POLI, District Judge.

Plaintiffs, on behalf of themselves and other women ilarly situated, challenge the provision of California mployment Insurance Code § 2626 which exempts preg-y-related work loss from the coverage of the state dis-ity insurance program until 28 days after the termina-

tion of pregnancy.[1] Each suffered a pregnancy-related disability, and solely because of § 2626, each was denied benefits. This treatment, plaintiffs argue, unconstitutionally discriminates against pregnant women. They ask that the court declare this portion of the statute invalid, enjoin the State Department of Human Resources Development from denying benefits on the basis of this provision, and require that the Department consider plaintiffs' applications for benefits as if the challenged provision did not exist. Because plaintiffs seek to enjoin the enforcement of a state statute, a three-judge court was convened pursuant to 28 U.S.C. § 2281. The parties have now filed cross-motions for summary judgment,[2] each agreeing that no relevant facts are in dispute.

I.

The California Unemployment Insurance Code establishes a comprehensive legislative scheme designed to provide protection against wage loss caused by involuntary unemployment. The disability insurance program, which is involved in this suit, provides benefits to persons unable to perform their customary work because of nearly any physical or mental condition; a complementary pro-

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1. California Unemployment Insurance Code § 2626:

"Disability" or "disabled" includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work. In no case shall the term "disability" or "disabled" include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter.

2. Defendant denominated his motion a motion to dismiss, but because it is accompanied by affidavits which the court considers, the court treats it as a motion for summary judgment. Fed. R. Civ. P. 12(b).

gram provides compensation to unemployed persons able to and available for work. Thus, the state has attempted to reduce to a minimum the suffering caused by involuntary unemployment of every type. Calif. Unemp. Ins. Code §§ 100, 2601.

The disability insurance program is wholly supported by employee contributions. At present, employees must contribute one percent of their salary up to a maximum of $85 per year. *Id.* §§ 984, 985, 2901. In order to be eligible to receive benefits, previous to the time of his disability an employee must have contributed one percent of a minimum income of $300 during a one year base period. *Id.* § 2652. Having satisfied this requirement, an employee is eligible to receive "basic benefits" varying between $25 and $105 per week, depending upon the amount earned during the base period, for a maximum of twenty-six weeks.[3] *Id.* §§ 2653, 2655. These benefits begin on the eighth day of disability, or, if the person is hospitalized, on the first day of hospitalization. *Id.* §§ 2627(b); 2802. While hospitalized, an employee is also eligible for "additional benefits" of $12 per day for a maximum of twenty days. *Id.* § 2801. The fund is protected against false claims by the requirement that claims be accompanied by the affidavits of a licensed medical practitioner attesting to the existence of a disability and by the requirement that an employee must submit to such reasonable examinations as the Department may require. *Id.* §§ 2627(c), (d), 2708, 2710.

In conformity with the aim of reducing the suffering of those unable to work regardless of the reason, the disability insurance program provides benefits on account of

3. This amount, however, cannot exceed one-half of the total wages paid to the individual during his base period. Calif. Unemp. Ins. Code § 2653.

nearly any incapacity. Those confined in an institution as a dipsomaniac, drug addict, or sexual psychopath are disqualified from receiving benefits while they are confined. *Id.* § 2678. The program compensates all others who are incapacitated with the *sole* exception that women, during a pregnancy and for 28 days after its termination, are denied benefits for any incapacity resulting from the pregnancy itself or any illness or injury caused by or arising in connection with the pregnancy. *Id.* § 2626. It is this special treatment that plaintiffs claim denies them the equal protection of the laws.

II.

Plaintiff Aiello, a self-supporting woman, was forced to cease working as a hairdresser on June 21, 1972, because of medical problems arising in connection with her pregnancy. The next day she was hospitalized, and after it was discovered that she was suffering from ectopic pregnancy, surgery was performed to terminate her pregnancy. Ms. Aiello's doctor ordered that she not return to work until July 28, 1972. On June 23 she applied for disability insurance benefits. These benefits were denied for the sole reason that her disability arose in connection with her pregnancy.

Plaintiff Armendariz is the sole source of support for herself, her husband, and an infant son. She was forced to cease working as a secretary on May 8, 1972, when she became ill and began bleeding. Early the next day she called an ambulance; on the way to the hospital she went into labor and suffered a miscarriage. Pursuant to the orders of her doctor, Ms. Armendariz did not return to work until the end of May. She applied for disability insurance benefits, and her application was denied solely because her disability arose in connection with pregnancy.

Plaintiff Johnson is the head of a household composed of herself and her five-year-old son. Their main source of support is the income she receives as an operator for the telephone company. Ms. Johnson entered the hospital on May 22, 1972, after experiencing intense abdominal pain, swelling in the legs, back pain, and general illness. Her condition was diagnosed as tubal pregnancy and, in order to save her life, an operation was performed to terminate the pregnancy. She was discharged from the hospital on May 30 and advised not to return to work until July 10. Her disability insurance claim was denied for the reason that her disability was disqualified by § 2626's pregnancy exclusion.

The last individual plaintiff, Ms. Jaramillo, was eight months pregnant when the initial petition for writ of mandate was filed. The court has been advised that she since had a normal delivery of her child. Except for her husband's educational expenses, her income is the sole source of support for herself, her husband, and their baby. Ms. Jaramillo wishes to receive benefits for the period during which she was physically incapacitated by the delivery of her child.

This case initially arose as two separate lawsuits. Ms. Aiello presented her claim in a federal court action, and the other plaintiffs initially presented their claims in a petition for a writ of mandate filed in the California Supreme Court. Defendant removed the state court action and it was subsequently consolidated with Ms. Aiello's suit. The plaintiffs who initially filed in state court moved that this court stay further proceedings pending the outcome of a state suit, but because neither the initial plaintiff nor the defendant saw any possibility that the statute could be construed so as to avoid the constitutional question, the motion was not granted. This court, therefore, must reach the federal constitutional claim presented.

III.

The threshold issue is what standard of review should be applied to test the validity of laws, such as § 2626, which discriminate on the basis of a sex-linked characteristic. In recent years the Supreme Court has employed two equal protection tests: If a statute is based upon a "suspect" classification, *e.g., Graham v. Richardson,* 403 U.S. 365, 372 (1971), or it concerns a "fundamental" interest, *e.g., Shapiro v. Thompson,* 394 U.S. 618, 627 (1969), it is subject to "strict scrutiny" and will be held invalid in the absence of a countervailing "compelling" state interest. In all other instances, a statutory classification is valid unless it is without "rational basis." *E.g., Dandridge v. Williams,* 397 U.S. 471, 485 (1970). *See generally Shapiro v. Thompson, supra* at 658-62 (Harlan, J., dissenting); *Developments in the Law: Equal Protection,* 82 Harv. L. Rev. 1065, 1076-1131 (1969) [hereinafter cited as *Developments*].

Although the Supreme Court has considered the question in two recent cases, *Frontiero v. Richardson,* CCH Sup. Ct. Bull. B2543 (May 14, 1973), and *Reed v. Reed,* 401 U.S. 71 (1971), it remains unclear how sex discrimination fits within equal protection doctrine. Although four members of the *Frontiero* Court were willing to hold that sex is a "suspect" classification, the majority refused to put sex in this category, at least until a case is presented that requires consideration of this extension of *Reed.* In view of the Supreme Court's intentional restraint, this court similarly does not consider whether sex discrimination is "suspect," because the challenged statute is invalid even under the *Reed* test. *See also Eisenstadt v. Baird,* 405 U.S. 438, 447 n.7 (1972).

Plaintiffs argue that, even under the test stated in the opinion in *Reed,* it is unclear how classifications based upon sex should be treated by the courts. Clearly the *Reed* Court

did not apply the "strict scrutiny" test. The Court, however, did hold invalid the statute challenged in *Reed*, whereas, until the last term, when the Court employed the "rational basis" test it almost always upheld the statute that was being scrutinized. *See generally* Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court*, 86 Harv. L. Rev. 1, 8 (1972); *Developments, supra* at 1087. Also, the opinion uses language quite different from language employed in some former "rational basis" opinions. *Compare Reed v. Reed, supra* at 75-76 *with, e.g., Dandridge v. Williams, supra* at 485. Finally, *Reed* rejects that idea that a challenged state statute can be justified on the basis of sexual stereotypes: Whereas the state supreme court found that avoiding hearings by having an automatic preference for men administrators is "neither . . . illogical nor arbitrary," because men generally have more experience in business matters, 93 Idaho 511, 514, 465 P.2d 635, 638 (1971), the Supreme Court deemed this "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause." 404 U.S. at 76. In this way, *Reed* greatly differs from some prior sex discrimination cases. *See Hoyt v. Florida*, 368 U.S. 57, 61-62 (1961); *Muller v. Oregon*, 208 U.S. 412, 421-22 (1908).

Because of these differences between *Reed* and prior "rational basis" test cases, it is not unreasonable to argue, as plaintiffs do, that *Reed* adopted an "intermediate test" for discrimination based upon sex. *See Eslinger v. Thomas*, ... F.2d ....., (5 E.P.D. ¶ 8530, at 7522) (4th Cir. Mar. 28, 1972); *Wark v. Robbins*, 458 F.2d 1295, 1297 n.4 (1st Cir. 1972) (dictum). It appears more likely, however, that *Reed* is not intended to establish a special equal protection test for sex discrimination. In *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972), the Court cites *Reed* as a case stating the test appli-

cable to "all equal protection cases." Similarly, in *Eisenstadt v. Baird, supra* at 446-47, the Court summarizes "[t]he basic principles governing application of the Equal Protection Clause" by quoting *Reed's* statement of the "rational basis" test.

These, and other, recent Supreme Court opinions show that *Reed* is probably only one of several cases that mark a general shift in the "rational basis" test to a standard "slightly, but perceptibly, more rigorous." *Green v. Waterford Bd. of Educ.*, ... F.2d ..... (sl. op. at 1729) (2d Cir. 1973); *see Gunther, supra* at 18-37. Under this test, courts must truly "scrutinize" challenged legislation and see whether the classifications made are "reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Reed v. Reed, supra* at 76; *see Eisenstadt v. Baird, supra at* 446-47.[4] The differences in application that have resulted from the use of this test are difficult to particularize. But, as Professor Gunther notes:

> Judicial deference to a broad range of conceivable legislative purposes and to imaginable facts that might justify classifications is strikingly diminished. Judicial tolerance of overinclusive and underinclusive classifica-

4. The suggestion in Judge William's opinion that *San Antonio Independent School Dist. v. Rodriguez*, 41 U.S.L.W. 4407, 4414 (S. Ct. Mar. 21, 1973), establishes a more tolerant standard than that quoted from *Reed* is incorrect. In *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 172 (1972), Mr. Justice Powell, the author of *Rodriguez*, states the "rational basis" test in words nearly identical to those used in *Rodriguez*. In that case the Court held invalid a state statute because fulfillment of an admittedly legitimate state purpose was "not *significantly* disturbed" by doing so. 406 U.S. at 175 (emphasis added); *see id.* at 183-84 (Rehnquist, J., dissenting). Thus, although Mr. Justice Powell states the "rational basis" test in different terms than those used by the Chief Justice in *Reed*, he, too, requires that a classification have a *substantial* rational relationship to a legitimate state purpose.

tions is notably reduced. Legislative leeway for unexplained pragmatic experimentation is substantially narrowed.

Gunther, supra at 20; *see Green v. Waterford Bd. of Educ., supra* at ..... (sl. op. at 1728-30). Also, as discussed above, the new test, as applied in *Reed,* requires rejection of statutory classifications based upon stereotypical generalizations rather than reason. *See Stanley v. Illinois,* 405 U.S. 645 (1972); *Heath v. Westerville Bd. of Educ.,* 345 F. Supp. 501, 506 (S.D. Ohio 1972); *cf.* 29 C.F.R. § 1604.1(a)(l)(ii).

This slightly altered "rational basis" test is the standard the court applies in this case. The court agrees with plaintiffs' conclusion that under this test the classification contained in § 2626 must be held to be unconstitutional.

IV.

Pregancy is clearly a unique human condition: only pregnancy can result in the birth of a child. For a woman, however, the effects of pregnancy and pregnancy-related illness are debilitating in much the same way as the physical and mental conditions that are included within the scope of the disability insurance program. The question whether the exclusion of pregnancy-related disabilities from the program is arbitrary or rational depends upon whether pregnancy and pregnancy-related illness substantially differ from the included disabilities in some manner relevant to the purposes of the disability insurance program.

The search for the purposes that actuated the legislature is a difficult one. The only purpose expressly stated for the enactment of the disability insurance program is "to compensate in part for the wage loss sustained by individuals

unemployed because of sickness or injury and to reduce to a minimum the suffering caused by unemployment resulting therefrom." Calif. Unemp. Ins. Code § 2601. Clearly the exclusion of pregnancy-related disabilities does not promote this purpose; the economic hardship pregnant women suffer when they cannot work is identical to the hardship of other disabled workers. Thus, the court must look to those unexpressed purposes that, according to the defendant, are promoted by excluding pregnancy-related disabilities from the program.

The principal argument the defendant has made in this court is substantially the same argument accepted in *Clark v. California Employment Stabilization Comm'n*, 166 Cal. App. 2d 326, 331-32 (1958)—that the exclusion of pregnancy-related disabilities is necessary to protect the solvency of the disability insurance program. As discussed, the program is financed entirely from employee contributions. To pay benefits for pregnancy-related disabilities, defendant argues, would be so costly that this mode of financing the program would be impracticable.

Clearly it is a legitimate interest for a state to attempt to preserve the fiscal integrity of its programs. *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969). More particularly, a state may properly seek to make a program self-sustaining and paid for by those who use it rather than by tax revenues drawn from the public at large. *United States v. Kras*, 41 U.S.L.W. 4117, 4122 (S. Ct. Jan. 10, 1973); *James v. Strange*, 407 U.S. 128, 141 (1972). "But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens." *Shapiro v. Thompson*, *supra* at 633; *see James v. Strange*, *supra* at 141-42; *Rinaldi v. Yeager*, 384 U.S. 305, 309-10 (1966). Thus, the fact that excluding pregnancy-related disabilities saves costs is only a first

step; the state also must show that the exclusion of pregnancy-related disabilities rests upon some ground of difference having a fair and substantial relation to the object of the legislation.

Defendant argues that pregnancy-related disabilities are unique in that coverage of these disabilities is so extraordinarily expensive that it would be impossible to maintain a program supported by employee contributions if these disabilities are included. Unfortunately, it is impossible to determine if the cost of including these disabilities is substantially greater than the cost of including other disabilities, because, according to defendant, no statistics are available indicating the cost to the program of paying benefits on account of various disabilities presently covered. Even using defendant's estimate of the cost of expanding the program to include pregnancy-related disabilities, however, it is clear that including these disabilities would not destroy the program. The increased costs could be accommodated quite easily by making reasonable changes in the contribution rate, the maximum benefits allowable, and the other variables affecting the solvency of the program. For example, the entire cost increase estimated by defendant could be met by requiring workers to contribute an additional amount of approximately .364 percent of their salary and increasing the maximum annual contribution to about $119.

Moreover, regardless of the effect the inclusion of pregnancy-related disabilities would have, these disabilities cannot be excluded merely because the cost of including the entire group might be prohibitive. While some women suffering pregnancy-related disabilities will have large claims, not all pregnant women will. As the court noted in *Heath v.*

Westerville Bd. of Educ., 345 F. Supp. 501, 505 (S.D. Ohio 1972), in its discussion of an analogous problem:

> Pregnancies, like law suits, are *sui generis*. While there are certain general similarities between each pregnancy, no two are entirely identical. While it may be quite true that some women are incapacitated by pregnancy and would be well advised to adopt regimens less strenuous than those borne by school teachers, to say that this is true of all women is to define that half of our population in stereotypical terms and to deal with them artificially. Sexual stereotypes are no less invidious than racial or religious ones. Any rule by an employer that seeks to deal with all pregnant employees in an identical fashion is dehumanizing to the individual women involved and is by its very nature arbitrary and discriminatory. [Citations and footnote omitted.]

Similarly, by excluding all pregnancy-related disabilities on the grounds that these claims will be large, the state denies pregnant women benefits on the basis of generalities and stereotypes contrary to the requirements of the equal protection clause.

Like the forced maternity leave in *Heath*, the denial of benefits for pregnancy-related disabilities seems to have its roots in the belief that all pregnant women are incapable of work for long periods of time, and therefore, they will submit large disability claims. The truth of this belief is certainly suspect. As the *Heath* court pointed out, the treatment of pregnancy in other cultures shows that much of our society's views concerning the debilitating effects of pregnancy are more a response to cultural sex-role conditioning than a response to medical fact and necessity. 345

F. Supp. at 505 n.1. Indeed, a realistic look at what women actually do even in our society belies the belief that they cannot generally work throughout pregnancy. *See Struck v. Secretary of Defense*, 460 F.2d 1377, 1379 (9th Cir. 1972) (Duniway, J., dissenting), *vacated and remanded to consider mootness*, 41 U.S.L.W. 3346 (S. Ct. Dec. 18, 1972). Nevertheless, the belief that pregnant women are disabled for substantial periods results in their being denied the opportunity to work, unemployment compensation benefits designed to aid those able to work, and—because of the belief that they will submit large claims—disability insurance benefits. *See generally* Walker, *Sex Discrimination in Government Benefits Programs*, 23 Hastings L. J. 277, 282-84, 285 (1971). Thus, the apparently solicitous attitude that pregnant women are in a "delicate condition" has the effect that they often cannot earn an income or obtain the usual social welfare benefits for the unemployed. The only way to assure that this irrational result is not simply the product of mistaken stereotypical beliefs is to require, as the equal protection clause does, that each pregnant woman be considered individually. *Cf. Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 19-20 (1971).

Therefore, if the state wishes to prevent or limit large claims, it must do so directly by excluding or limiting all claims in excess of certain amounts, not by excluding a disability that, in the opinion of the legislature, is likely to result in large claims. Then, to the same extent a heart attack victim or one suffering from sickle cell anemia is limited in the benefits he can receive, a woman disabled by pregnancy who makes a large claim will be limited.[5] Preg-

5. In such a nondiscriminatory system, if the contribution rate generated too much or too little income, increases or decreases in benefits would be spread across the entire work force. In the past, when excess income was generated the legislature increased the benefits to all workers except pregnant women.

nant women with smaller claims, however, would then be able to collect disability insurance benefits rather than be denied any relief on account of a stereotypical belief about women.[6]

The court, therefore, concludes that pregnancy-related disabilities cannot constitutionally be excluded solely because of the cost of adding these benefits. Defendant has failed to point to any rational ground of difference that would lead the court to conclude that it is not merely saving expense by arbitrarily denying benefits to a class of citizens. Thus, this case is like the hypothetical situation once suggested by the Supreme Court of a state reducing expenditures for education by barring indigent children from the schools. *See Shapiro v. Thompson, supra* at 633. Accordingly, the saving of cost cannot justify the classification.

Defendant also argues that other purposes actuated the legislature when it excluded pregnant women from the disability program. Although clearly the saving of costs was the main purpose, the court considers these other purposes, because they might be genuine secondary purposes. *See McGinnis v. Royster,* 41 U.S.L.W. 4259, 4263 (S. Ct. Feb. 21, 1973).

First, defendant suggests that one purpose of excluding pregnancy-related disabilities was to prevent women from receiving more than their share of benefits under the disability insurance program. This argument is based upon

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6. Although plaintiffs have argued that § 2626 is the result of stereotypical beliefs, others have suggested that pregnancy-related disabilities were excluded because women are a politically weak group, and reducing budgets by denying social welfare benefits to groups of women is, therefore, politically expedient. *Walker, supra* at 285. Precluding discrimination based upon political expediency is, of course, one of the traditional functions of the equal protection clause. *See Railroad Express Agency, Inc. v. New York,* 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

the fact that, at the present time, women contribute about 28 percent of the total disability insurance fund and receive back about 38 percent of the fund in benefits. Even if the state could constitutionally create a disability insurance program based upon actuarial data and tie the amount of benefits various groups would receive to the amount they contribute, the California disability insurance program is not such a program. Indeed, the program has a scale of benefits which is designed so that its likely effect will be that those earning small incomes will receive more in benefits than they contribute. *See* Calif. Unemp. Ins. Code § 2655. Thus, defendant must admit, and he candidly does admit, that it cannot be argued that in California's system "the right to benefits should have any relationship to the amount contributed to the fund." Defendant's Memorandum of Law at 12. In view of the absence of any consistent attempt to limit benefits of various groups based upon actuarial considerations, the state certainly cannot justify limiting benefits for pregnant women on this basis. To do so discriminates between these women and members of other groups who receive benefits greater than their contributions, and it, therefore, can be upheld only if some rational difference justifies the discrimination. No such difference exists, especially as between pregnant women and other women suffering sex-related disabilities.

Next, defendant argues that pregnancy-related disabilities were excluded to prevent abuse of the disability program. Pregnancy, defendant notes, is, to a large degree, voluntary, and he suggests that this would make it possible for a woman not interested in a career to abuse the disability insurance program by working a short period, be-

coming pregnant, and collecting a substantial award.[7] But pregnancy-related illness and injuries, such as those suffered by plaintiffs Aiello, Armendariz, and Johnson are not voluntary, and they, too, are excluded from coverage. Moreover, every other voluntary disability, including, for example, cosmetic plastic surgery, in included. Thus, it is difficult to believe that pregnancy-related disabilities were excluded to avoid abuse. If that was the legislature's purpose, the present scheme achieves it so irrationally that it cannot be upheld. *See Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 173 (1972); *Eisenstadt v. Baird*, 405 U.S. 438, 448-52 (1972).

Defendant's final argument is that pregnancy-related disabilities are excluded to avoid potentially difficult problems of determining when a woman is truly disabled by a pregnancy-related condition. There is some question whether a state may constitutionally discriminate against a class of persons merely to eliminate hearings on the merits of their claims. *See Stanley v. Illinois*, 405 U.S. 645, 656-57 (1972); *Reed v. Reed*, *supra* at 76. *But see Weber v. Aetna Cas. & Sur. Co.*, *supra* at 174-75. Even if this is a permissible objective, however, it is difficult to understand the rationality of achieving it by excluding only pregnancy-related disabilities until 28 days after the termination of pregnancy. First, a condition is no more easily shown to be disabling 28 days after the termination of pregnancy than prior to that time. Second, there is no reason to believe that the general requirements—that a claim be accompanied by a doctor's certificate and that a

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7. Defendant suggests the following hypothetical case: A woman who is not interested in pursuing a career could work one year, earn $8,500, contribute $85 to the disability insurance fund, become pregnant, and collect $2,730 *if* a doctor certified that she was disabled by her pregnancy for 26 weeks.

claimant submit to examination when defendant requires—will work any less well to assure the validity of pregnant women's claims than other claims. Certainly defendant cannot successfully argue that all pregnancy-related disabling conditions manifest themselves in less objective form than included disabilities. The conditions plaintiffs suffered, for example, resulted in dramatic, objective, medically verifiable disabilities. Finally, some conditions normally included as disabilities are excluded from coverage if they occur in connection with pregnancy. Clearly these conditions are no more objectively verifiable simply because the victim is not pregnant. Thus, it is unlikely that the state excluded pregnancy benefits to obviate problems of proof; if this was the purpose, there is not a sufficient rational relationship between the means and the end.

Having found that the exclusion of pregnancy-related disabilities is not based upon a classification having a rational and substantial relationship to a legitimate state purpose, the court must hold unconstitutional the provision of § 2626 excluding these benefits. Although this may require adjustments in the details of the disability insurance program, it does not interfere with the salutory purposes of the program. Nor does it thwart the state's legitimate interest in financing the program from the contributions of those receiving benefits. Fulfillment of these goals does not require that the disability insurance program embody an element of discrimination that denies pregnant women equal treatment.

In accordance with the foregoing, which constitutes the court's findings of fact and conclusions of law,

It Is Hereby Ordered and Adjudged that:

(1) plaintiffs' motion for summary judgment is granted and defendant's motion for summary judgment is denied;

(2) the third sentence of California Unemployment Insurance Code § 2626, which provides, "In no case shall the term 'disability' or 'disabled' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter," deprives pregnant women of the equal protection of the laws contrary to the Fourteenth Amendment, and it therefore void;

(3) defendant, his successors in office, agents, and employees are enjoined from refusing to grant disability insurance benefits on account of the third sentence of California Unemployment Insurance Code § 2626;

(4) defendant shall forthwith reconsider the applications of plaintiffs Aiello, Armendariz, Johnson, and Jaramillo for disability insurance benefits and grant them such benefits as they are entitled to receive without regard for the third sentence of California Unemployment Insurance Code § 2626;

(5) the judgment that the court enters shall be a final judgment pursuant to Rule 54(b), Federal Rules of Civil Procedure, there being no just reason for delay in entry of final judgment for these plaintiffs; and

(6) plaintiffs are directed to prepare and submit a form of judgment in accordance with the foregoing and Local Rule 123.

Dated:

/s/ BEN. C. DUNIWAY
United States Circuit Judge

/s/ ALPHONSO J. ZIRPOLI
United States District Judge

United States District Judge

CAROLYN AIELLO etc., v. SIGURD HANSEN, etc.

NO. C-72-1402 SW

WILLIAMS, District Judge: I respectfully dissent.

I.

Plaintiffs herein, each denied disability insurance benefits by virtue of California Unemployment Insurance Code § 2626, claim that they are the victims of unreasonable discrimination based on their sex and are thus denied equal protection of the laws guaranteed by the Fourteenth Amendment. While conceding that there are some constitutionally permissible classifications on the basis of sex, they contend that no such valid basis exists here.

Defendant argues that this is not a discrimination against womankind, but only a permissible limitation of liability as to certain women during the transitory period of their pregnancy—plus 28 days; that viewed in its entirety the California Disability Insurance program is not discriminatory against women since they are faring much better than men under it;[1] that the limitation of liability provided by § 2626 is a reasonable insurance regulation based on valid economic objectives[2] derived from sound actuarial considerations; that it bears a rational relationship to the objectives of the legislation and that the granting of plaintiffs' motion would, in the name of equality, create an even greater program imbalance in favor of women over men.[3]

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1. Women contribute only 28% of withholdings but draw 38% of the benefit payments. Put another way, men receive $.89 per dollar contributed while women receive $1.37 per dollar contributed.

2. Defendant estimates that providing the claimed benefits to the estimated 210,000 who would be eligible would cost $120.2 million and require a 30% increase of revenue, either by increasing the rates or raising the ceiling of income subject to disability withholding.

3. Comparison of Male and Female Occupational Groups indicate that even without maternity benefits women have a higher annual claim rate, claim duration, and claim cost than men in every age group except 60-69.

II.

As in all Equal Protection matters the court must first determine the standard to be used in assessing the validity or invalidity of the State legislation under attack. If the legislation interferes with a right explicitly or implicitly guaranteed by the Constitution or involves a suspect classification, the state must carry the heavy burden of justification by showing a compelling state interest therefor. If such a fundamental right is not involved, and if the classification is not suspect, the state is entitled to the usual presumption of validity and the individual carrying the attack has the burden of showing that it fails to rationally further any legitimate state purpose. *Rodriguez v. San Antonio Independent School District* ..... U.S. ..... 41 Law Week 4407 (1973).

The majority states that while it is likely ". . . that *Reed* is not intended to establish a special equal protection test for sex discrimination", the case does represent a movement toward a new standard ". . . slightly, but perceptively, more rigorous." This leads us, the court concludes, to an equal protection analysis that rejects ". . . statutory classifications based upon stereotypical generalizations rather than reason." But I do not read pre-*Reed* cases as teaching anything less than this, and I believe that *Reed* teaches nothing more. The pivotal language of that opinion is a concise statement of the traditional test:

> "The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration *bears a rational relationship to a state objective that is sought to be advanced* by the operation of §§ 15-312 and 15-314." (emphasis added)

That such was and is the applicable standard is amply demonstrated in *Rodriguez supra* wherein Justice Powell, writing for a majority of the court, states:

> "A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review which requires only that the State's system be shown to bear *some rational relationship to legitimate state purpose.*" (emphasis added) 41 Law Week 4419.

Furthermore, in its most recent consideration of this question, a closely divided Supreme Court declined to hold that classifications based on sex are suspect.[4]

III.

Viewed separately, § 2626 seems to present an almost *per se* case of invidious discrimination. This appearance quickly dissolves, however, when in applying the rational relationship test, we view § 2626 in its context as an integral part of the Disability Benefits program.

The Disability Insurance Program is one segment of a three-part comprehensive insurance program to cover workers in California, the other two segments being Workmen's Compensation Insurance and Unemployment Insurance. The Workmen's Compensation Insurance Program was first enacted in California in 1913 and provided compensation for job-related illnesses or injuries regardless

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4. *Frontiero v. Richardson* ..... U.S. ..... No. 71-1694 (1973) 41 Law Week 4609. While the Court held 8-1 that the classification under attack violated the Equal Protection Clause of the 14th Amendment, only four (Justices Brennan, Douglas, White and Marshall) believed classifications based on sex to be 'suspect'. Three (Justices Powell, Blackmun, and the Chief Justice) specifically declined to take that step, Justice Stewart separately concurred that the statute worked an invidious discrimination and Justice Rehnquist dissented.

of fault. Then and now the law required all "employers" (as defined by statute) to secure payment of compensation for their employees by purchasing insurance from the State Fund, approved private insurance carriers or through self insurance (Labor Code § 3700). The entire costs are borne by the employer, it being a criminal offense to shift any of the cost thereof to the employee (Labor Code § 3751). The California Unemployment Insurance Program was adopted in 1935 and is also financed exclusively by employer contributions, no part of the cost of which is to be shifted to the employees.[5] Its purpose is to protect the purchasing power of persons becoming unemployed through no fault of their own, both for their own benefit and the benefit of the economy of the state.[6] The original act excluded payments for unemployment caused by illness or injury, and provided for a 1% *employee* contribution. By 1946, experience indicated that this 1% was not needed to finance the unemployment insurance program. Accordingly, Governor Earl Warren requested, and the legislature enacted, the Disability Insurance Program in which the 1% was used to cover those situations where unemployment was caused by *non*-job related illness or injury. "It is not possible," Warren said, "for employees to obtain from private insurance companies protection against loss of wages or salary during sickness as adequately or cheaply as the protection could be obtained by diverting their 1% contribution for the support of a Disability Benefits Program."[7]

Accordingly, there can be no serious question that these programs were conceived by the Legislature as *insurance*

5. California Unemployment Insurance Code § 976.
6. California Unemployment Insurance Code § 100.
7. California Senate Journal, June 23, 1946 pp. 228-229.

programs to be operated under insurance concepts.[8] Furthermore, there is little question that their objective was to protect against workers' loss of income by providing the broadest coverage and maximum benefits available within the limit of funds generated by a 1% contribution.

Governor Warren's message to the legislature requested that the premiums be set at 1%. The fact that this was done and has been continued at 1% over the years would indicate a continuing determination on the part of the legislature to operate the program within that level of contribution. Further indication of this intent is found in Cal.Unemp. Ins.Code § 2604 which authorizes the director of the program (with approval of the Governor) to forestall any emergency insolvency in the fund by altering the scale of benefits, or increasing waiting time for benefits. He is not authorized to increase the contribution rate, a power retained exclusively in legislative hands.

Additional evidence of the legislative's continuing determination to retain the 1% contribution level can be drawn from a review of the progress of Senate Bill 419 through the most recently concluded session of the state legislature. As introduced on March 1, 1972, S.B. 419 would have amended § 2626 to allow maternity benefits[9] for periods

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8. *Gillum v. Johnson*, 7 C.2d 744 (1936); *Calif. Comp. Ins. Co. v. Ind. Acc. Com.*, 128 C.A.2d 797 (1954); *Garcia v. Ind. Acc. Com.*, 41 C.2d 689 (1953); *Miller & Lux Inc. v. Ind. Acc. Com.*, 179 C. 764 (1919).

9. It is possible to construe § 2626 as *impliedly* excluding maternity benefits associated with a nomal pregnancy, since they arise neither from illness or injury, and *specifically* excluding benefits for illnesses or injuries arising in connection with complicated pregnancies until 28 days after the termination of the pregnancy. Plaintiffs reject this theory and contend that once a pregnancy compels a doctor to certify that the patient is unable to continue her employment benefits should accrue whether the pregnancy be normal *or* complicated.

beginning six (6) weeks before confinement and continuing nine (9) weeks thereafter, provided the claimant had been employed ten (10) months prior to the date of termination of the pregnancy. The bill was amended six (6) times before ultimate passage. The first amendment (June 5, 1972) allowed regular disability payments for specified abnormal conditions of pregnancy in addition to the originally proposed maternity benefits. The second amendment (June 20) increased employee contributions (up to a 73% increase) to cover the costs thereof, and the third (July 20) excluded maternity benefits and removed the proposed increased contributions. Coverage for specified abnormal conditions of pregnancy was retained. Thereafter it was once more amended (July 25) to provide additional revenue to cover the increased costs by increasing the level of income subject to the 1% contribution. After one final technical amendment (November 28) it was passed and presented to the Governor.

During all of its deliberations, the legislature had before it the cold, hard fiscal impact estimates which undoubtedly substantially affected its judgment in balancing employee contributions against benefits. For example, it was estimated that if S.B. 419 (as amended on June 5) became law, payments for basic disability benefits would increase $144.3[10]

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10. Defendant offers no explanation as to the variance between this figure and those offered for the purpose of this litigation (*supra* Note 3). The disparity however points up the difficulty of accurately estimating the fiscal impact of adding maternity benefits as well as the general economic magnitude thereof. Since this action affects only the Disability Insurance Benefits of the California Fund, and not similar public programs in other states, or similar private programs throughout the nation that could be subject to the same attack under Title VII of the Civil Rights Act of 1964, (as contended in the Amicus Curiae brief filed by the EEOC) the total financial consequences of the majority's opinion could be many times the initial $144 million involved here.

million (27.2%). The overall effect on the program would be to provide benefit payments equalling 142.4% of contributions. In its final form as passed by the legislature (and vetoed by the Governor) S.B. 419 covered only abnormal complications of pregnancy, excluded disabilities arising from therapeutic abortion, and provided necessary financing by increasing the ceiling on the amount of salary subject to the 1% contribution from $8,500 to $9,000.[11]

A review of the history of the legislative's treatment of *benefits* is also revealing. In each instance when the 1% contribution rate generated a surplus the legislature chose to spread it across the entire work force (including women in plaintiffs' claimed class) in the form of increased benefits rather than for financing the removal of the limitation on liability here under attack.[12] The sole amendment to § 2626 was one of form only and in essence reaffirmed the legislative policy of excluding liability for pregnancy related illness or injury for the period commencing with the incidence of the illness or injury and ending on the 28th day after the termination of the pregnancy.

Accepting as I do the legitimacy of these legislative objectives, it is difficult to imagine any statutory provision that could be more rationally related thereto, for without § 2626, the legislature would be compelled to either decrease expenditures by reducing overall benefit levels or increase contributions through higher rates or ceilings. Additionally

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11. Even if enacted into law S.B. 419 would, under plaintiffs' reasoning, have been constitutionally defective.

12. The Section establishing the payment levels (§ 2655) was amended at least once in each of the following years: 1955; '57, '59, '61, '63, '65, '68 and '71. Over that period the minimum monthly benefit was raised from $10 to $25 and the maximum from $35 to $105. Provisions for Additional Benefits to cover hospitalization costs were added in 1953 (§ 2801) and were liberalized both as to amount and duration in 1953, 1957 and 1970.

the program is far from arbitrary. It is under constant legislative surveillance[13], legislative action is preceded by thorough study and deliberation, and appears to be based on a careful balancing of the merits of increased benefits against the offsetting demerits of increased contributions[14].

The majority holds that the purpose of § 2626 is purely economic and that ". . . the saving of cost cannot justify the classification." Page 14, *supra*. I disagree. Even though § 2626 is essentially economic in nature its broader objective of enabling the legislature to construct a comprehensive program of benefits at minimal cost to the participants is certainly valid. And there is ample authority that classifications based on economic consideration can be valid.[15] Furthermore, if all legislative enactments that produce unequal financial impact on various classes are to be deemed suspect—a not illogical result of the majority's reasoning . . . the courts would be compelled to inject themselves into just the kind of controversy the Supreme Court sought to avoid in *Dandridge* when it stated, ". . . the constitution does not empower this Court to second-guess state officials with the difficult responsibility of allocating limited public welfare funds among the myraid of potential recipients." *Dandridge v. Williams*, 397 U.S. 471, 487 (1969).

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13. A review of its entire legislative history shows that the Disability Benefits program has been amended no less than 241 times since its enactment in 1946.

14. In upholding the validity of the Texas school financing scheme Justice Powell was careful to point out . . . "The Texas plan is not the result of hurried, ill-conceived legislation. It certainly is not the product of purposeful discrimination against any group or class. On the contrary, it is rooted in decades of experience in Texas and elsewhere, and in major part is the product of responsible studies by qualified people." 41 Law Week 4423.

15. *O'Gorman & Young v. Hartford Ins. Co.*, 282 U.S. 251 (1930) and *Borden's Co. v. Baldwin*, 293 U.S. 194 (1934).

The highest State Court to consider the validity of § 2626 reached this same conclusion. *Clark v. California Employment State Com.* 166 C.A.2d 326 (1958). There, the plaintiff claimed the section subjected her to an unreasonable classification and deprived her of equal protection of the laws. In upholding the constitutionality of § 2626 the court said.

• • •

"A statute which excludes individuals of a specified class from benefits conferred thereby does not violate constitutional guarantees of due process of law, equal protection of the law, or uniform application of the law, providing the classification adopted is reasonably related to the purpose of the statute and is based on some natural, intrinsic or constitutional distinction which suggests a reason for and justifies the exclusion . . . Such a classification must not be arbitrary or unreasonable, but must be characterized by some substantial qualities or attributes which render the particular exclusion from benefits necessary or appropriate."

• • •

"It is a matter of common knowledge that illness or injury arising from pregnancy is classified and excluded from the coverage provided by private contracts of health and accident insurance, in order to effect a premium rate lower than is required in the absence of such an exclusion. It is reasonable to assume that the inclusion of illness or injury caused by pregnancy within the coverage provided by the statute would increase substantially the demands upon the Fund and require a like increase in the contribution rate. As these conclusions are within reason, the inquiry into conditions establishing them is a matter for the Legislature, . . . It was properly within the sphere of legislative action to determine whether the objects of the statute in question would be served best by including a disability benefit which reasonably might impose upon the majority of employees a burden disproportionate to contemplated benefits, in order to favor the minority

who are included within the classified group. These reasons indicate that the class excluded was not arbitrarily selected, and that the purpose of the exclusion was germane to the legislative object." 166 C.A.2d at pp. 331-332.

A further rationale for § 2626, and one which the legislature is far better equipped to evaluate than is the court, is a legislative desire to avoid a potential calculated exploitation of the program. As pointed out by the defendant the voluntary aspect of pregnancy could lead to planned use of the program which was not contemplated in the creation of the program and not possible in most other disabilities. In order for a worker to collect maximum benefits of $105 per week for 26 weeks, it is only necessary to earn $8,500 per year and have 1% of that sum, or $85.00 per year withheld as a disability insurance contribution. If pregnancy were covered, a woman not ordinarily pursuing a career, could go to work for one year, and would then be eligible to collect $2,730 in pregnancy benefits if her doctor will certify that she is temporarily disabled from working the full 26-week period.

IV.

To the extent that § 2626 discriminates against women (it is exceedingly difficult to talk about equality of treatment between the sexes when pregnancy is involved), it does so reasonably. It is my opinion that the challenged statute is constitutionally valid and that by holding otherwise today the court is merely substituting its own judgment for that of the legislature.

/s/ SPENCER WILLIAMS
United States District Judge

Appendix B

United States District Court
for the Northern District of California

Filed Jun 19 1973
Clerk, U.S. Dist. Court

Carolyn Aiello, individually and on behalf of all others similarly situated, *Plaintiff,* vs. Sigurd Hansen, as Director of the State Department of Human Resources Development, *Defendant.*	No. C-72-1402 SW
Augustina D. Armendariz, Elizabeth B. Johnson, Jacqueline Jaramillo, et al., individually and on behalf of all other women similarly situated, *Petitioners,* vs. Sigurd Hansen, as Director of the State Department of Human Resources Development, *Respondent.*	No. C-72-1547 SW

This action came on for hearing on cross motions for summary judgment before a three-judge court, the Honorable Spencer Williams, District Judge, presiding. Certain issues having been duly heard and a decision on those issues having been duly rendered, and there being no just reason for delay of entry of final judgment and the court having expressly directed that judgment be entered,

It is Ordered and Adjudged, pursuant to Rule 54(b), that:

(1) Plaintiff's motion for summary judgment is granted and defendant's motion for summary judgment is denied;

(2) The third sentence of California Unemployment Insurance Code § 2626, which provides, "In no case shall the term 'disability' or 'disabled' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter" deprives pregnant women of the equal protection of the laws contrary to the Fourteenth Amendment and is therefore void;

(3) Defendant, his successors in office, agents, and employees are enjoined from refusing to grant disability insurance benefits on account of the third sentence of the California Unemployment Insurance Code § 2626;

(4) Defendant shall forthwith reconsider the applications of plaintiffs Aiello, Armendariz, Johnson, and Jaramillo for disability insurance benefits and grant them such benefits as they are entitled to receive without regard for the third sentence of the California Unemployment Insurance Code § 2626; and,

(5) The judgment of the Court is final forthwith.

Dated at San Francisco, California, this fourth day of June, 1973.

/s/ BEN. C. DUNIWAY

/s/ ALPHONSO J. ZIRPOLI

Appendix C

United States District Court
for the Northern District of California

Filed—Aug—7 1973
Clerk, U. S. Dist. Court

Carolyn Aiello, etc., *Plaintiff,* vs. Sigurd Hansen, etc., *Defendant.*	No. C-72-1402 SW
Augustina D. Armendariz, et al., *Petitioners,* vs. Sigurd Hansen, etc., *Respondent.*	No. C-72-1547 SW

ORDER DENYING MOTION TO RECONSIDER

The motion of defendant Sigurd Hansen, Director of the State Department of Human Resources Development, to reconsider and set aside the judgment entered in the above numbered causes on June 15, 1973, is denied.

Dated: July 31, 1973

/s/ Ben. C. Duniway
United States Circuit Judge

United States District Judge

/s/ Alfonso J. Zirpoli
United States District Judge

Appendix D

In the United States District Court
for the Northern District of California

Filed—Aug—7 1973
Clerk, U. S. Dist. Court

Carolyn Aiello, etc., *Plaintiff,* vs. Sigurd Hansen, etc., *Defendant.*	No. C-72-1402 SW
Augustina D. Armendariz, et al., *Petitioners,* vs. Sigurd Hansen, etc., *Respondent.*	No. C-72-1547 SW

MEMORANDUM

I believe the motion for reconsideration should be granted. Regretfully, it is apparent that despite the considerable time and effort expended by both the parties and the court on this matter, the ultimate legal issue raised in these complaints has not yet been resolved. This lawsuit centers on the alleged unconstitutionality of Section 2626 of the California Unemployment Insurance Code, which reads:

> "Disability" or "disabled" includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work. In no case shall the term "disability" or "disabled" include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter.

The majority has ruled unconstitutional the last sentence of that section. We are now left with a shorter, but more ambiguous statute. The remaining language does not assist

the State in determining whether disability due to normal pregnancy is covered by the insurance plan. If the majority looks upon a normal, healthy pregnancy as a mental or physical illness or injury, then I believe it has gone a long way in establishing a more offensive stereotype than any previously feared by plaintiffs. If the majority has chosen instead to characterize pregnancy as a "physical or mental *condition*" (§ 2626, second sentence, emphasis added) having nothing to do with injury or illness, it does so only by ignoring the obvious coloring of the definition of "condition" lent by the "injury" and "illness" language of the first sentence. And if this is the court's holding, then it has bestowed upon women workers in California a *maternity* insurance program never contemplated by the California legislature or courts.

The distinction between healthy and complicated pregnancies as it relates to the constitutionality of § 2626 becomes even more crucial in light of the recent decision by the California Court of Appeal in *Rentzer v. California Unemployment Insurance Appeals Board*, Civ. No. 40694 (Second Division, May 24, 1973), where benefits for disability due to "ectopic pregnancy" were held not excludable under § 2626.[fn] Until this court comes to grips with this basic distinction, its decision will be the source of much confusion to the administering authorities, to the public and, as an appeal is likely, to the Supreme Court. For these reasons, I think we should re-hear the matter and issue a more definitive ruling.

Dated: August 3, 1973.

/s/ SPENCER WILLIAMS
United States District Judge

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fn. As that section read prior to this court's May 31 ruling.

Appendix E

EVELLE J. YOUNGER, Attorney General
of the State of California
ELIZABETH PALMER
Assistant Attorney General
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Attorneys for Defendant

Filed Jun 21, 1973

In the United States District Court
For The Northern District of California

CAROLYN AIELLO, individually and on behalf of all others similarly situated, *Plaintiff,* v. SIGURD HANSEN, as Director of the State Department of Human Resources Development, *Defendant.*	Civ. No. C-72-1402 SW
AUGUSTINA D. ARMENDARIZ, ELIZABETH B. JOHNSON, JACQUELINE JARAMILLO, et al., individually and on behalf of all other women similarly situated, *Petitioners,* v. SIGURD HANSEN, as Director of the State Department of Human Resources Development, *Respondent.*	Civ. No. C-72-1547 SW

MOTION TO RECONSIDER AND SET ASIDE SUMMARY JUDGMENT

Defendant, Sigurd Hansen, Director of the California Department of Human Resources Development, files this

motion for reconsideration of the judgment entered herein on June 15, 1973, holding void and enjoining further enforcement of a portion of section 2626 of the California Unemployment Insurance Code, on the following ground:

A change in the challenged statutory provision was brought about by the decision of the Court of Appeal for the Second Appellate District of the State of California on May 24, 1973 in the case of *Rentzer v. California Unemployment Insurance Appeals Board*, which interpreted the statutory exclusion very narrowly. The decision of the Court of Appeal was rendered shortly before this Court's decision was announced, so that there was no opportunity to call attention to it. The *Rentzer* decision, and the liberal administrative interpretation given it by the Department of Human Resources Development, have effected a significant change in section 2626. It is respectfully requested that this Court reconsider its judgment herein in light of the change in state law which has occurred.

WHEREFORE, defendant prays that the Court hear this motion and set aside its order granting summary judgment for plaintiff.

DATED: June 20, 1973

EVELLE J. YOUNGER
Attorney General
ELIZABETH PALMER
Assistant Attorney General

/s/ JOANNE CONDAS
JOANNE CONDAS
Deputy Attorney General
Attorneys for Defendant

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Attorneys for Defendant

In the United States District Court
For The Northern District of California

CAROLYN AIELLO, individually and on behalf of all others similarly situated, *Plaintiff,* v. SIGURD HANSEN, as Director of the State Department of Human Resources Development, *Defendant.*	Civ. No. C-72-1402 SW
AUGUSTINA D. ARMENDARIZ, ELIZABETH B. JOHNSON, JACQUELINE JARAMILLO, et al., individually and on behalf of all other women similarly situated, *Petitioners,* v. SIGURD HANSEN, as Director of the State Department of Human Resources Development, *Respondent.*	Civ. No. C-72-1547 SW

AFFIDAVIT IN SUPPORT OF MOTION TO RECONSIDER AND SET ASIDE SUMMARY JUDGMENT

State of California
City and County of San Francisco—ss.

I, JOANNE CONDAS, being duly sworn, depose and say:

1. I am attorney for the defendant, and have been in

charge of this litigation since its inception and am personally familiar with the facts herein stated.

2. The case of *Gail E. Rentzer v. California Unemployment Insurance Appeals Board* was commenced, by petition for writ of mandate in the Superior Court of the State of California for the County of Los Angles, on January 19, 1972. The Superior Court denied the petition and Ms. Rentzer filed a notice of appeal to the Court of Appeal, Second Appellate District on March 29, 1972. The case was pending on appeal at the time of the commencement of both the *Aiello* and *Armendariz* actions. A decision in the *Rentzer* case was issued May 29, 1973. The case was not called to this Court's attention because the sole issue presented by the petitioner and appellant in *Rentzer* was whether an ectopic pregnancy was a pregnancy at all, within the contemplation of the statute. No challenge to the constitutionality of the exclusion of pregnancy was made.

3. The Court of Appeal, *sua sponte,* reexamined the precedent decision of *Clark v. California Emp. Stab. Com.,* 166 Cal.App.2d 326 (1958), pointed to its repeated use of the phrase "maternity benefits" and concluded that only "maternity benefits" were intended to be excluded. A copy of the decision in *Rentzer v. California Unemployment Insurance Appeals Board,* is attached hereto as Exhibit A.

4. In light of the rationale of the *Rentzer* decision, the Department of Human Resources Development has administratively determined that the statutory exclusion should be read to authorize compensation for injury or illness arising out of or in connection with pregnancy, and to exclude only "maternity benefits", that is, hospitalization and disability benefits for normal delivery and recouperation. A copy of a proposed letter to the eligibility workers of the Department of Human Resources Development is attached hereto as Exhibit B.

5. By virtue of the above-mentioned decision, and the interpretation given it by the agency administering the disability fund, this Court should have considered the much narrower question whether equal protection is denied to pregnant women who are eligible for disability compensation for illnesses and injuries arising out of or in connection with pregnancy but who are not granted maternity benefits.

Executed at San Francisco, California, June 20, 1973.

/s/ JOANNE CONDAS
JOANNE CONDAS
Deputy Attorney General

Subscribed and sworn to before me
this 20th day of June, 1973

/s/ CLAUDIA V. TARVER
Notary Public in and for said County
and State.

Appendix F

Evelle J. Younger, Attorney General
of the State of California
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Attorneys for Defendant

In the United States District Court
For the Northern District of California

Filed—Aug 13 9 20 AM '73

Carolyn Aiello, individually and on behalf of all others similarly situated, *Plaintiff,* vs. Sigurd Hansen, as Director of the State Department of Human Resources Development, *Defendant.*	Civ. No. C-72-1402 SW
Augustina D. Armendariz, et al., individually and on behalf of all other women similarly situated, *Petitioner,* vs. Sigurd Hansen, as Director of the State Department of Human Resources Development, *Respondent.*	Civ. No. C-72-1547 SW

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

Notice is hereby given that Dwight Geduldig, successor to Sigurd Hansen as Director of the Department of Human

Resources Development of the State of California, defendant above named, hereby appeals to the United States Supreme Court from the final judgment of the three-judge district court filed herein on June 15, 1973, and from the order denying defendant's motion to reconsider filed herein on August 7, 1973.

This appeal is taken pursuant to 28 U.S.C. sections 1253 and 2101(b).

Dated: August 13, 1973.

Respectfully submitted,

Evelle J. Younger, Attorney General of the State of California
Elizabeth Palmer
Assistant Attorney General
/s/ Joanne Condas
Joanne Condas
Deputy Attorney General
Attorneys for Defendants

Appendix G

§ 984. ***Employee contributions; amount***

Each worker shall pay worker contributions, at the rate of 1 percent with respect to the wages paid to him by each employer for employment after his employer has satisfied the conditions set forth in this part with respect to becoming an employer. Contributions required under Sections 708 and 708.5 shall be at the rate of 1.25 percent of the remuneration deemed to have been received under said sections.

(Stats.1953, c. 308, p. 1485, § 984. Amended by Stats.1957, c. 2107, p. 3731, § 1; Stats.1961, c. 2153, p. 4445, § 9; Stats. 1961, c. 2154, p. 4450, § 4; Stats.1963, c. 1563, p. 3146, § 4; Stats. 1965, c. 745, p. 2153, § 1.3, eff. June 24, 1965; Stats. 1967, c. 1725, p. 4299, § 6)

§ 2601. ***Purpose; construction***

The purpose of this part is to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury and to reduce to a minimum the suffering caused by unemployment resulting therefrom. This part shall be construed liberally in aid of its declared purpose to mitigate the evils and burdens which fall on the unemployed and disabled worker and his family.

(Stats.1953, c. 308, p. 1529, § 2601.)

§ 2604.5 ***Disability fund; cost study by director***

(a) The director shall study and determine:

(1) The annual cost to the Disability Fund of paying benefits under Sections 2610, 2611, 2653, 2655, 2710, and 2801 of the Unemployment Insurance Code under the amendments proposed in Senate Bill No. 633 of the 1968 Regular

Resources Development of the State of California, defendant above named, hereby appeals to the United States Supreme Court from the final judgment of the three-judge district court filed herein on June 15, 1973, and from the order denying defendant's motion to reconsider filed herein on August 7, 1973.

This appeal is taken pursuant to 28 U.S.C. sections 1253 and 2101(b).

Dated: August 13, 1973.

Respectfully submitted,

Evelle J. Younger, Attorney General of the State of California
Elizabeth Palmer
Assistant Attorney General
/s/ Joanne Condas
Joanne Condas
Deputy Attorney General
Attorneys for Defendants

Appendix G

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(Stats.1953, c. 308, p. 1485, § 984. Amended by Stats.1957, c. 2107, p. 3731, § 1; Stats.1961, c. 2153, p. 4445, § 9; Stats. 1961, c. 2154, p. 4450, § 4; Stats.1963, c. 1563, p. 3146, § 4; Stats. 1965, c. 745, p. 2153, § 1.3, eff. June 24, 1965; Stats. 1967, c. 1725, p. 4299, § 6)

§ 2601. Purpose; construction

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(1) The annual cost to the Disability Fund of paying benefits under Sections 2610, 2611, 2653, 2655, 2710, and 2801 of the Unemployment Insurance Code under the amendments proposed in Senate Bill No. 633 of the 1968 Regular

Session of the Legislature, as last amended, compared with the annual cost of paying benefits under Section 2655 in effect for periods of disability commencing on and after January 1, 1969 and prior to January 1, 1970.

(2) The cost to the Disability Fund of Senate Bill No. 633 of the 1968 Regular Session of the Legislature, as last amended.

(3) The annual cost to the Disability Fund of paying benefits under wage bases other than those proposed by Senate Bill No. 633 of the 1968 Regular Session of the Legislature, as last amended, compared with the annual cost of paying benefits under Section 2655.

(b) In making this study, the director shall use acceptable statistical and actuarial methods and shall use the most recent revenue and claims experience for which reliable data are available.

(c) The director shall report, not later than March 31, 1969, to the Governor and the Legislature the results of the study required by this section.

(Added by Stats.1968, 1st Ex.Sess. c. 5, p. 34, § 1.)

§ *2627. Eligibility for benefits*

A disabled individual is eligible to receive disability benefits equal to one-seventh of his weekly benefit amount for each full day during which he is unemployed due to a disability only if the director finds that:

(a) He has made a claim for disability benefits as required by authorized regulations.

(b) He has been unemployed and disabled for a waiting period of seven consecutive days during each disability benefit period with respect to which waiting period no benefits are payable; and

(c) Except as provided in Section 2709 he has submitted to such reasonable examinations as the director may require

for the purpose of determining his mental or physical disability.

(d) He has filed a certificate as required by the provisions of Section 2708 or 2709.

(Stats.1953, c. 308, p. 1532, § 2627. Amended by Stats.1953, c. 449, p. 1695; Stats.1953, c. 1371, p. 2946.)

§ 2801. *Amount of additional benefits during hospitalization; hospital defined*

During confinement in a hosptial, an individual eligible for benefits under this part is entitled to receive in addition to all benefits otherwise provided in this division and irrespective of his receipt of remuneration from his employer, the amount of twelve dollars ($12) for each day not in excess of 20 days in any one disability benefit period, during which he is so confined pursuant to orders of his physician or of a practitioner duly authorized by any bona fide church, sect, denomination or organization whose principles or teachings call for dependence for healing entirely upon prayer or spiritual means.

For the purposes of this part, "hospital" includes those institutions operated as hospitals but exempt from licensing by the State Department of Public Health under the provisions of subdivision (c) of Section 1415 of the Health and Safety Code.

(Stats.1953, c. 308, p. 1541, § 2801. Amended by Stats.1953, c. 1371, p. 2946; Stats.1957, c. 2107, p. 3735, § 7; Stats.1970, c. 1133, p. 2011, § 2.)

Appendix H

Certified for Publication

In the Court of Appeal of the State of California
Second Appellate District

Division Two

2d Civil No. 40694
(Sup. Ct. No. C 19074)

Gail E. Rentzer,
Petitioner and Appellant,
v.
California Unemployment Insurance Appeals Board Human Relations Agency,
Respondent.

Valley Presbyterian Hospital,
Real Party in Interest.

APPEAL from judgment of the Superior Court of Los Angeles County. John Cole, Judge. Reversed.

Messrs. Rentzer, Segall & Gilbert, Inc., by Robert D. Rentzer, for Appellant.

Evelle J. Younger, Attorney General, Elizabeth Palmer, Assistant Attorney General, Edward M. Belasco and Blanche C. Bersch, Deputy Attorneys General, for Respondent.

Mandamus. Gail Rentzer suffered an ectopic pregnancy[1]

1. Webster's Third New International Dictionary defines "ectopic pregnancy" as "gestation elsewhere than in the uterus."

when gestation occurred in one of her fallopian tubes, a part of the body in which a fetus cannot survive. The tube ruptured, surgery was required to save Rentzer's life, and as a consequence she was unable to work for six weeks. Rentzer appeals a judgment of the superior court refusing to order the California Unemployment Insurance Appeals Board to award her unemployment compensation disability benefits for the first 28 days of her six-week disability.

At issue is the interpretation of Unemployment Insurance Code section 2626, which provides in pertinent part:

> "In no case shall the term 'disability' or 'disabled' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter."

The Board argues that Rentzer was ineligible for disability benefits for the first 28 days of her disability because her disability arose in connection with pregnancy. Rentzer argues that an "ectopic pregnancy" is really no pregnancy at all, that the Legislature did not intend the 28-day exclusion to apply to her condition.

The question is whether Rentzer's condition amounted to an illness "caused by or arising in connection with pregnancy," which therefore fell within the 28-day period of disability exclusion required under section 2626. While no California cases are directly in point, the scope of section 2626 was considered in *Clark v. California Emp. Stab. Com.*, 166 Cal.App.2d 326 (1958), where a woman disabled from employment because of pregnancy challenged section 2626 as a denial of equal protection of the laws. In upholding the reasonableness and validity of the statutory exclusion the court said that exclusion of pregnancy-con-

nected conditions amounted, in effect, to an exclusion of maternity benefits:

> "[T]o award disability compensation to women employees on account of illness caused by pregnancy, in effect, constituted a *maternity benefit plan* for a limited group, i.e., women employees. The purpose of the unemployment disability program is to afford relief to employees sustaining loss of wages on account of illness, and not to confer *maternity benefits*. To accomplish this purpose the Legislature was entitled legally to adopt such measures as might be necessary to exclude the indirect award of *maternity benefits* as an incident to the administration of its unemployment disability program. The consequent classification adopted has a substantial relation to the legitimate object thus sought to be accomplished." (166 Cal.App. 2d at 332; italics added.)

We agree with the court's conclusion that the legislative purpose in enacting the pregnancy exclusion of section 2626 was to spare the unemployment disability program the costs of a maternity benefit plan. (See Colquitt M. Walker, "Sex Discrimination in Government Benefit Programs," 23 Hastings Law Journal 277, 285 (1971).)

But Rentzer's disability was not an ordinary maternity disability involving preparation for and recuperation from normal gestation and delivery. Neither the fetus nor Rentzer could have survived the full term of gestation. Emergency surgery was performed not to deliver a viable child, but to stop internal bleeding, repair the ruptured fallopian tube, and halt a doomed, lifeless pregnancy. In *Jerger v. Commercial Ins. Co.* (Ohio 1965) 211 N.E.2d 99, plaintiff incurred medical expenses in connection with an ectopic pregnancy, and then sought reimbursement under a medical

insurance policy that excluded coverage "for pregnancy or any complications therefrom." Construing the policy liberally in favor of the insured, the court of common pleas ruled that an ectopic, or tubal, pregnancy ("a term about which the general public has little or no knowledge and which is entirely different from pregnancy") was not excluded by the terms of the policy. (See also, Annot., 97 A.L.R. 2d 1068.)

The Board points out that it has long interpreted the pregnancy limitation on disability as including ectopic pregnancy and the Legislature has not overruled that interpretation by amending section 2626. However, we do not look upon the prior administrative interpretation of the statute as conclusive and controlling, inasmuch as final responsibility for statutory interpretation lies with the courts and not with administrative bodies. "While administrative constructions are entitled to great weight when the language of a statute is ambiguous, final responsibility for the interpretation of the law rests with the court and an erroneous administrative construction does not govern the interpretation of the statute, even though the statute is subsequently reenacted without a change. [Citation.]" (*People v. Navarro*, 7 Cal.3d 248, 274.)

Unemployment Insurance Code section 2601 states that the purpose of California's disability compensation law "is to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury and to reduce to a minimum the suffering caused by unemployment resulting therefrom. [The law] shall be construed liberally in aid of its declared purpose to mitigate the evils and burdens which fall on the unemployed and disabled worker and his family." Under this rule of liberal construction we conclude that an ectopic pregnancy is not a true

pregnancy within the meaning of section 2626 and that Rentzer is entitled to disability benefits for the full period of her disability.

The judgment is reversed, and the cause is remanded to the superior court with directions to issue the writ.

Certified for Publication.

FLEMING, J.

We concur:
ROTH, P.J.
COMPTON, J.

Appendix I

#1 SCHRD 6-18-73
TO: JOANNE CONDAS, DEPUTY ATTY GENL, SAN FRANCISCO

FROM: JOHN OBENAUER, COUNSEL, LEGAL SECTION DEPT OF HRD, SACRAMENTO

FIELD OFFICE DIRECTIVE [Letterhead]

Division of Job Training, Development, Placement, & Insurance Payments

Draft
No. 3- DI-
June 18, 1973

To: Field Office Managers

SUBJECT: Disability Insurance Payment Policy for Pregnancy-Related Disabilities

1. The California District Court of Appeal has ruled in the *Rentzer* case that DI benefits cannot be denied for abnormal conditions of pregnancy on the basis of the third sentence of Section 2626 of the UI Code.
2. As a result of this court action, Field Office Directive No. 3-177 DI-4 is modified in the following manner:
   a. If otherwise eligible, DI benefits shall be paid for abnormal pregnancy with involuntary complications of the conceptus. This includes but is not limited to hydatidiform mole; miscarriage that is spontaneous, missed, or incomplete; ectopic site; cesarean delivery; and eclamptic states.
   b. For days of disability which arise on or after June —, 1973, for all other pregnancy-related conditions not covered by paragraph a., above, the date in Item 3 of the 2501 shall be established in accordance with the third sentence of Section 2626 (Section 607 of the DOPM).

3. Until further notice, if an urgent problem arises concerning this modification of policy and procedures, phone Carl Peterson, UI-DI Section, ATSS 485-9101 or 445-9101. Any written requests for clarification shall be addressed to UI-DI Section, Attn: DI Group (MIC 29) with a copy to the Regional Administrator.
4. Retain this Field Office Directive until cancelled.

/s/ NIELS H. PEDERSEN, Deputy Director